No. 15882

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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ANNA VALETTA NOCITA, Claimant of ONE 1957 FORD THUNDERBIRD AUTOMOBILE, MOTOR No. D7FH116357, its tools and appurtenances,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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## ANSWERING BRIEF OF APPELLANT.

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For the purpose of this answering brief, we shall confine ourselves to the answering of those statements and arguments of Government counsel which we believe pertinent. The fact, however, that statements or arguments made in behalf of appellant in her opening brief are not repeated herein should not be taken as an indication of abandonment of any such statement or argument.

### I.

### The Sufficiency of the Evidence.

There appears to be some controversy as to the evidence which is before the Court and a wide difference, apparently, between appellant and appellee as to the inferences to be drawn therefrom, and as to the propriety of the findings drawn by the Court. The findings in

question are numbers VII and VIII [R. 20], the pertinent parts of which are as follows:

> "That prior to and on or about November 24, 1956, said Ford Thunderbird automobile had been used by said Roland Nocita in receiving wagers.
> . . .
>
> "That the use of the said Ford Thunderbird automobile by the said Roland Nocita was a use in his business of bookmaking and was an active aid and facilitation of that bookmaking business."

The Government contends (App. Br. pp. 7-15) that these findings were supported by the evidence. The weakness in the position of the Government arises from a confusion of the activities of Nocita in the bookmaking business with the use of the car. The issue here is not whether Nocita himself engaged in bookmaking or accepting wagers as an occupation (that is conceded), but whether the *automobile* was used in receiving wagers [*cf.* Libel of Information, R. 3-5].

Evidence pertaining to the use of the automobile falls into three categories: (a) testimony relative to November 20, 1956; (b) testimony relative to November 24, 1956; and (c) testimony of Rudolph Vincelli.

**(a) Testimony Relative to November 20, 1956.**

Three officers testified that they observed Nocita in the Ford Thunderbird on November 20, 1956.

Special Agent Donley testified that he observed the car on Long Beach Boulevard at about 6:10 p. m. on November 20, 1956, and that it was being driven by Nocita [R. 28]; that he followed the car, which drove to Lime and San Vicente, stopped a moment, and then backed out

[R. 30]. Nocita was alone in the car and Donley did not observe him to get out of the car nor anyone approach the car [R. 39-40]. After the car backed up about ten feet, it then proceeded west on San Vicente [R. 40].

Special Agent Katayama testified that he observed Nocita driving the Thunderbird north on Long Beach Boulevard at about 6:00 p. m. on November 20, 1956 [R. 83]; that Nocita was alone in the car at all times [R. 88-89]; that Nocita neither got out of the car nor did anyone approach it [R. 90]; that although he trailed the car, he lost it at a traffic signal after it had turned around and was proceeding south [R. 84].

Deputy Sheriff Scholten testified that on November 20, 1956, at an unspecified time, he saw Nocita driving the Thunderbird at the corner of Cole Place and Long Beach Boulevard, in the City of South Gate; that about ten or fifteen minutes later, he saw him in the same car at the corner of San Vicente and Lime Avenue in Compton [R. 140]; that he got out of the car [R. 140]; that he believes Nocita was alone, although not sure [R. 141]. No testimony was offered by this witness as to Nocita's actions in getting out of the car, or even whether he left its vicinity.

The Government attempts to put the above evidence together with the evidence of one Walter O. Barrett [R. 133-139] to establish that the car was used on November 20, 1956, for the purpose of receiving wagers. Barrett testified that he shared the rental of an apartment at 14651 South Lime, near the intersection of Lime and San Vicente, with Nocita [R. 133-134]; that he, Barrett, stayed there about two nights a week [R. 135], and on such occasions was not there from 8 in the morning until 10 at night [R. 135]; that he left football bets

for himself and friends at the apartment [R. 136] for someone to pick up [R. 137]; that Nocita had a key to the apartment [R. 137], although Nocita did not live there [R. 138]; that someone other than Nocita or Mrs. Nocita (whom he did not know) used the apartment during the day [R. 138].

The Government argues (App. Br. 13) that from the above testimony placing Nocita in the automobile in the *vicinity* of the apartment on November 20th, there is a sufficient inference that the automobile was used by Nocita to pick up betting cards and money on that date so as to constitute a use of the vehicle in receiving wagers, and thus support the findings of the Trial Court.

The evidence, however, is totally lacking in the following particulars: (1) that Barrett was even in the apartment on or about November 20; (2) that Barrett or anyone else made any bets or other gambling transactions on November 20; (3) that Nocita, or anyone else in his behalf, was in the apartment on that date; (4) that Nocita, with or without the car, received or engaged in a wagering transaction of any kind or nature at any location on November 20. Actually, Barrett's testimony does not go so far as to state that Nocita received or picked up wagering transactions at the apartment on any date; to the contrary, he testified that of his knowledge persons other than Nocita used the apartment during the day [R. 138].

All of the above witnesses, including Barrett, were produced by the Government, and it is bound by their testimony.

Thus, it cannot be said that the evidence shows the use of the automobile in any manner in gambling transactions on November 20, 1956.

**(b) Testimony Relative to November 24, 1956.**

The other occasion upon which the officers had the car under observation was on November 24, 1956, the day of the arrest. Although on that date, from twelve o'clock noon until 6:05 p. m. (the time of Nocita's arrest), the car was under constant scrutiny by Deputy Sheriff Seltzer [R. 67], it was parked on Central Avenue [R. 67], across the street from the Smoke Shop [R. 70], and Deputy Sheriff Seltzer did not see Nocita during that period of time [R. 70]. Clearly, during this period of time, the car was not used in a gambling transaction, or to facilitate one. Nor is there any evidence that any gambling transaction took place away from the car during this period of time.

Thus, despite the Government's obvious reluctance to accept the premise (App. Br. 15), we come back to the question of Vincelli's testimony as being the crux of the whole proposition as to whether or not the automobile here involved was used in a gambling transaction as stated in the libel of information.

**(c) Testimony of Rudolph Vincelli.**

The testimony of Rudolph Vincelli was set forth in detail and discussed in our opening brief (Op. Br. 19-23), to which reference is made, with particular reference to Vincelli's failure to identify the forfeited vehicle as being the car driven by Nocita on his visit to the place of business of Vincelli.

Vincelli testified that in the middle of November, 1956 [R. 98] Nocita called on him for the purpose of picking up Nocita's share of the proceeds of bets previously made [R. 97, 103-104]. Vincelli was emphatic that no bets were made or picked up at that time [R. 97, 105].

Entirely aside from identification of the car, we are then confronted with two questions: (a) Were the events described by Vincelli in violation of the Internal Revenue Code? (b) If so, do they come within the charge made in the libel of information?

As to the first question, there was no testimony by Vincelli showing the use of the car in an illegal transaction, since the act of receiving money, the product of wagers previously made, by one who has not paid the wagering occupational tax is not a violation of the Internal Revenue Code (see Op. Br. 24-28). As to whether the events described by Vincelli come within the charge made in the libel, the Government has contended (App. Br. 16-23) that a direct use of the car in an illegal transaction need not be established, that the use of the car to aid or facilitate the wagering business is sufficient, and that the Trial Court has found it was used to aid and facilitate.

It must be recognized that the words "aid and facilitate" have a meaning in law distinct from "used in." For example, Title 49, United States Code, Section 781, which provides for the forfeiture of vehicles used to transport contraband (narcotics, firearms, counterfeits), has a special subdivision dealing with facilitation. In commenting on this, Chief Judge Smith, of the District Court for the District of Connecticut, stated:

> "The addition of the subdivision of the statute concerning facilitating transportation and sale makes it plain that some uses of the car were contemplated which did not involve use of the car directly in transportation, concealment or possession of narcotics.
>
> " 'Facilitate' as used here means that the car was used to make easy, to promote, to help forward the

purchase and sale of heroin. U. S. v. One 1941 Pontiac, etc., *supra*, 83 F. Supp. at page 1000."

*United States v. One 1951 Oldsmobile,* 126 Fed. Supp. 515, 516.

Section 7302 of Title 26, United States Code, under which the instant libel was brought, contains no such provision with relation to facilitation, indicating that it was not the intent of Congress to include facilitation as an element involved.

Nor does the libel of information herein make the charge that the vehicle here involved was used to "aid or facilitate" the bookmaking business, as was attempted to be found by the Trial Judge in his findings [Find. VIII, R. 20]. The charge to which the Government is confined, and upon which appellant is entitled to rely, is:

> "That said automobile had been used by said Roland Nocita in receiving wagers without filing application for a wagering permit, and without payment of wagering occupation tax. . . ." [R. 3-4].

A finding as to a matter not within the issues raised by the pleadings may be disregarded.

As pointed out above, an allegation in the libel of information charging that the vehicle was used to "aid or facilitate" the illegal activity would not have been within the statutory limitations of Section 7302 of Title 26, United States Code.

## II.

## Vehicle Not Used to Aid or Facilitate Receipt of Wagers.

In its brief, it is the contention of the Government that, although the vehicle here involved was not directly used in the receipt of wagers, it was used to aid and facilitate their receipt (App. Br. 22).

If it be considered that Section 7302, Title 26, United States Code, includes "aid and facilitation" within the word "use", and that the matter of aid and facilitation was before the trial court although not embraced in the pleadings (both of which we do not concede), nevertheless the evidence falls short of showing that the car was used to aid or facilitate the receipt of wagers.

Carefully read, the testimony of Rudolph Vincelli, upon which the Government relies, shows clearly that no gambling transactions were had on the occasion of Nocita's call to his place, nor was it contended that any gambling transactions resulted therefrom. The testimony of Vincelli was that he acted as the agent of Nocita in accepting wagers from patrons at his (Vincelli's) bar [R. 92-93], for which he received a commission of 25 per cent of the winnings [R. 104]. If the bettors won, he would receive money from Nocita to pay them off, but if the bettors lost, he would collect the money and turn it over to Nocita [R. 95].

On the occasion in November, 1956, when Nocita was claimed to have driven the Ford Thunderbird to Vincelli's bar, Nocita was there for the sole purpose of picking up his share of the winnings [R. 105] after the deduction of Vincelli's share [R. 104]. No other transactions were had [R. 105].

Obviously, therefore, the transactions which gave rise to the payment of money to Nocita on that occasion were completed ones. The bets had been made, the winner determined, and the losers had paid their money to Vincelli prior to Nocita's arrival on the scene.

This is an entirely different situation from that presented in *United States v. One 1953 Oldsmobile Sedan,* 132 Fed. Supp. 14, upon which case the Government places great reliance (App. Br. 16). There, the vehicle was used daily for the purpose of reaching each customer and paying winnings or receiving losses with respect to bets placed the preceding day. Such use was an intrinsic part of the direct dealings with the customer, and was the regular established procedure of the business. In the instant case, the event of Nocita's call on Vincelli was an isolated one [R. 95-96], and was not shown to be established procedure.

The Government also places great reliance on the case of *United States v. General Motors Acceptance Corporation* (C. A. 5), 239 F. 2d 102 (App. Br. 17-21). The case was before the Court of Appeals on the question of the sufficiency of the complaint, a motion to dismiss having been granted in the lower court. The complaint, however, charged that the truck involved was directly used in the gambling transactions in the following language:

> "That said vehicle was used on September 25, 1954, by Henry Brantley in the business of accepting wagers without having paid the wagering occupational tax . . .; more specifically, the said Henry Brantley was transporting in said vehicle lottery tickets used and intended to be used in the business of accepting wagers as aforesaid. . . ."

Thus, the complaint charged the transportation of the paraphernalia to be used in the gambling to be undertaken. This is clearly a different situation from that in the instant case.

The cases of *United States v. One 1941 Buick,* 85 Fed. Supp. 402, and *United States v. One Chevrolet, etc.,* 91 Fed. Supp. 272, cited by the Government (App. Br. 22), were decided prior to and are in direct conflict with the determination of the Supreme Court in *United States v. Lane Motor Company,* 344 U. S. 630. (*Cf. United States v. Lane Motor Company* (C. A. 10), 199 F. 2d 495.)

*United States v. One 1952 Lincoln* (C. A. 5), 213 F. 2d 786 (App. Br. 21-22), involved an automobile used as a convoy or decoy car for a truckload of illicit alcohol, and which was used in an abortive attempt to block the officers pursuing the truck. Such facts bear no resemblance to those before the court.

The Government has attempted to rationalize *United States v. Lane Motor Company, supra,* by placing an emphasis on the word "solely" in the Court's statement that a "vehicle used solely for commuting to an illegal distillery is not used *in* violating the internal revenue laws" which was not placed there by the Court. The Government argues that any use other than commuting would be in violation of the internal revenue laws (App. Br. 20-21). The Government argues (App. Br. 21-23) that the instant vehicle was used for "something more than commuting," in that it was used by Nocita to go to Vincelli's bar to make his collections on certain wagers, and therefore became subject to forfeiture. This argument, however, is completely answered, not only by the evidence as discussed above but also by the Court of Appeals for the Third Circuit in the case of *United States v. One 1948*

*Plymouth Sedan, etc.* (C. A. 3), 198 F. 2d 399, 400, where it is said:

> "The question before us cannot be answered simply by examining the face of the statute. For example, many kinds of property under conceivable conditions may be used as an adjunct to a violation of internal revenue laws. A fraudulent income tax return may be filled out and signed with a pen; it may then be delivered to a Collector in a private automobile. We do not understand the government to contend that under such circumstances either the pen or the car may be forfeited.
>
> "The United States contends, however, that the Plymouth Sedan was an integral part of an illegal business; that it carried a commodity of an importance equal to sugar, mash or other raw materials in the successful operation of that business, viz., the operator of the still himself, and that therefore the car is forfeitable. We cannot agree."

The most that can be said in the instant case is that the forfeited car *may* have been the one used to carry Nocita to pick up his share of receipts from wagers previously made and to carry him and his receipts away again. While this *may* have been something more than commuting, any illegal act coming within the terms of Section 7302, United States Code, was over and done, and it is submitted that the forfeited car could therefore not have aided or facilitated its doing.

## Conclusion.

Since the judgment of the District Court can be supported neither on the evidence nor on the law applicable thereto, it is respectfully urged that it be reversed.

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